IN THE

# Supreme Court of the United States

Supreme Court, U. S.
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**October Term, 1978**

**No. 78-30**

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

*Petitioners,*

against

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

*Respondents,*

and

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

# Supreme Court of the United States

**October Term, 1978**

**No. .....**

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, *et al.*,

*Petitioners,*

v.

GEORGE ARTHUR, *et al.*,
EWALD NYQUIST, *et al.*,

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### Brief for Respondents in Opposition

The respondents (plaintiffs below) oppose the petition for certiorari of Joseph Manch, individually and as Superintendent of Schools of the City of Buffalo, Eugene T. Reville, individually and as Superintendent of Schools of the City of Buffalo, The Board of Education of the City of Buffalo and its individual members, the Mayor of the City of Buffalo, the Common Council of the City of Buffalo and its individual members (the "City petitioners").

## Questions Presented

1. Did Both Lower Courts Correctly Apply Legal Standards as Enunciated by This Court in Determining that the City Petitioners Acted or Failed to Act with Segregative Intent?

2. May Courts, Sitting in School Desegregation Cases, Consider, as Relevant and Probative, Evidence and Proof of Private and Public Residential Segregation?

3. Is the Circuit Court's Reversal as to Liability of the State Defendants, Consistent with the Affirmance of Liability, by the Circuit Court, of the City Petitioners?

## Statement of the Case

### A. Procedural History

This brief will rely on the appendix to the petition for certiorari submitted by the City Petitioners in No. 78-. . . ., which will be cited as "App".

The procedural history of this case, including the decision of the District Court, is summarized in the petition and will not be repeated here. Petitioners' statement with respect to the decision of the Court of Appeals, however, is argumentative rather than factual and requires clarification.

The Circuit Court's decision does not impose an affirmative duty to achieve racial balance in the Buffalo schools as contended at page 12 of Petitioners' Brief. The decision affirms the District Court's finding that "the City Appellants (petitioners herein) are liable for unlawful segregative acts." (App. 166a).

On appeal, the Circuit Court considered both the District Court's original liability opinion (App. 1a-117a) and its supplemental opinion issued upon consideration of recently decided Supreme Court cases (App. 143a-162a).



The Court of Appeals closely examined the actions and inactions of the City petitioners, which the District Court had found to be *de jure* segregative conduct (App. 179a-182a). The Court of Appeals concluded that:

> We are unable to imagine a set of facts, short of public admission of wrongdoing, which would be more suggestive of intentional discrimination. We are confronted here with a pattern of action and inaction the natural and foreseeable consequence of which is the increased segregation of the Buffalo Public Schools. This being sufficient to make out a *prima facie* case of intentional segregation, it must be inquired whether the appellants have been able to rebut this conclusion. We find nothing in the record, however, which suggests a neutral, non-discriminatory rationale for the pattern of actions taken by the City appellants. No policy, save segregation itself, can consistently explain the pattern of transfers, zoning, optional attendance areas, staff recommitment and assignment and general obstructionism which marks the actions of the City appellants. We consequently approve the findings of the District Court that these appellants acted in intentional violation of 42 U.S.C. § 1983 (App. 182a).

### B. Factual History

At the time of the liability trial, the pupil population of the Buffalo Public Schools was 60,060, of whom 53.3% were white, and 46.7% were non-white (App. 25a). The system consisted of 77 elementary schools, 4 middle and 2 junior high schools, 7 academic and 6 vocational-technical high schools (App. 25a).

With few exceptions, there were separate schools for whites and separate schools for blacks. At the time of trial, 55 of 77 elementary, 5 of 6 middle and junior high schools, and 7 of 13 high schools were from 80-100% majority or minority (App. 25a).

Perhaps the most powerful summary of the City defendants segregative acts which compelled the District Court to find widespread segregation, and constrained the Second Circuit to remark that "We are unable to imagine a set of facts, short of public admission of wrong doing, which would be more suggestive of intentional discrimination" (App. 182a), are the findings of the respondent Ewald P. Nyquist, then Commissioner of Education of the State of New York, who in January 1975, after nine defiant years of dealing with Buffalo Board of Education, stated the following in an order to show cause:

> A review of other events over the past nine years makes it clear that the respondent has not only neglected to develop and implement an effective plan for racial integration of its schools, but by certain of its acts, procedures and policies has increased segregation within its schools.
>
> The respondent has changed the grade levels served by certain schools, and in so doing has transferred minority students from predominantly white schools to predominantly minority schools.
>
> The respondent has operated a school attended by predominantly black children in an area which is surrounded by predominantly white schools. In so doing the board has established and maintained school attendance areas which have resulted in segregation.
>
> The respondent has maintained certain grade structures for predominately white schools and other grade structures for predominately minority schools. According to 1974-75 data, of the twenty-eight schools serving grades K-8, twenty are predominately white. The district's K-4 schools are all predominately white, and its K-7 schools are predominately white. While its K-5 and K-6 schools range from 6.7% minority enrollment to all minority students, most are substantially segregated. Only two of the thirty-four K-5 and K-6 schools have minority enrollments which are within 10% of the district average.



> Differences in grade structure account for most white students entering high school at the ninth grade level, and most minority students entering at the tenth grade level, thus creating racially isolated schools for the ninth year.
>
> The respondent has maintained 'optional transfer zones' which have resulted in an intensification of segregation. Data indicate that white students living within such zones have been transferred from schools with increasing minority enrollments to predominately white schools, with no comparable transfers from those areas on the part of black students.
>
> The respondent has established attendance zones for newly constructed schools which have resulted in those schools being substantially segregated, although attendance zones could have been established in such a way that the student bodies would have been integrated.
>
> The respondent has made decisions and established policies which have resulted in substantially segregated programs in special education for mentally retarded pupils. The board has arranged to transport many special education children to essentially segregated schools.
>
> The board has operated an essentially all-black vocational school for girls.
>
> The board has operated a school for pregnant girls which has an all-black student body.
>
> The respondent has permitted white students to transfer out of a high school with an increasing minority population to other predominantly white high schools under a transfer policy based on course selection and offerings. In past years the board approved the offering of certain foreign languages in predominantly white high schools but did not offer comparable courses in a predominantly black high school, thus encouraging increased racial isolation. This transfer policy was substantially responsible for a high school becoming, in 1974-75, 99% black in student population.

The respondent has not employed minority professional staff members in numbers which are comparable to the school enrollments of the general population of the city. During the past eight years the percentage of minority staff members has actually declined. A pattern has been developed of assigning minority teachers to schools with high minority populations, thus intensifying the racial isolation of students in the school system.

The respondent, in official board action in 1965, instructed its superintendent to develop an integration plan, but specified that it must not involve the transportation of white children into non-white areas. Such action illustrates the dual standards which have prevailed in board policies concerning the education of white and minority-group children, and which have resulted in a segregated school system.

It is clearly evident from these facts that the respondent is maintaining a segregated school system, a condition which is contrary to law and to state policy.

It is also evident that the Buffalo board of education has taken actions which have had both the purpose and the effect of maintaining a substantially segregated school system, and that there is a direct relationship between the acts of the board of education and the current condition of segregation. In taking such actions, and in continuing to operate a segregated school system, the Buffalo board of education has violated the Fourteenth Amendment to the Constitution of the United States and has denied equality of educational opportunity to many of its children by reason of their race [Exh. 306; A-1743; A-1747] (Appendix in 2nd Circuit).

The brief of the petitioners deftly passes over these events as if they just happened.

Among the many significant findings of segregative intent, the Court below found that beginning in 1954, the school authorities througn a series of boundary changes and optional



zones, redistricted East High School (App. 32a-36a, 180a). The cumulative effect of these actions was found to exclude from the East High School district areas of white population density and include within the district areas of black population density (App. 32a-36a).

The lower Courts also found that between 1960 and 1972, the City petitioners permitted significant numbers of white students to transfer from East High School to other academic high schools in the district to take special language courses not offered at East (App. 36a-43a). Despite warnings as early as 1963, from certain administrative staff that this policy would result in increasing segregation at East High School, the policy continued until 1972, when the school had become 98.3% black (App. 39a-41a).

The manner in which the school authorities drew attendance boundaries for the newly constructed Woodlawn School was found by the lower Courts to have intentionally resulted in that school opening with a 99% black student population (App. 49a-54a, 181a). It was found that the school authorities decision with respect to Woodlawn's attendance area was "strongly influenced by residents who opposed integrated schooling." (App. 181a).

It was also found that the manner in which the school authorities administered policies on student transfers and optional zones, allowed white students to transfer from predominantly black schools to predominantly white schools (App. 54a-64a, 181a).

The admissions policies of the City's vocational high schools were found to be racially discriminatory (App. 64a-68a, 181a).

The policies of the school authorities with respect to staff were found to be racially discriminatory and segregatory (App. 68a-77a, 181a).

As regards the local school authorities, the Courts found that the Board engaged in "dilatory, evasive and at times obstructionest" conduct in response to the State Commissioner and Regents' order to integrate (App. 77a-98a, 182a). The Courts found that the Common Council aided the Board in their resistance by "systematically" denying funding to programs which would have encouraged racial integration (App. 86a-90a, 182a).

Additionally, the Courts found that the City of Buffalo defendants (also petitioners herein) assigned residents to the City-operated public housing projects in a segregative manner (App. 102a-108a). The Courts further found that relocated families, displaced as a result of urban renewal, in a manner which exacerbated segregated housing conditions (App. 109a).

The lower Courts found that various schools within the Buffalo Public School system were segregated, that this segregation was intentionally caused by the petitioners, and that a substantial and meaningful portion of the school district had been intentionally segregated (App. 99a). The Courts further found that the petitioners failed to meet their burden of showing that the instances of segregation were not caused by their design or device. *Keyes v. School District, No. 1, Denver*, 413 U.S. 189, 210 (1973) (App. 100a, 182a).

## ARGUMENT

### I. The Lower Courts Correctly Applied the Standards Enunciated by This Court in Determining that the City Petitioners Acted or Failed to Act with Segregative Intent.

The City petitioners' contention that certiorari should be granted to review the legal standards which were applied by the lower Courts totally ignores the explicit statements of the



Courts below in their legal analyses (App. 19a-22a, 146a-158a, 173a-182a), and is without merit.

1. Contrary to the simplistic approach in Petitioners' brief, in determining the Constitutional liability of the City petitioners for the segregation existing within the Buffalo Public Schools, the lower Courts did not rely on or apply the mere "discriminatory effects" test which has been rejected by this Court. *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

In their analyses of the applicable standards, the District Court and Court of Appeals began with this Court's decision in *Keyes v. School District, No. 1, Denver*, 413 U.S. 189 (1973), which has been cited with approval by this Court in *Washington v. Davis* and *Arlington Heights*, for the proposition that proof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause (emphasis added).

In *Keyes*, this Court held that where it had been shown that school authorities by various actions and inactions, including school site location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, concentrated minority students in certain schools and white students in other schools, the burden was on the school authorities to show that such actions were not taken to create or maintain segregation (413 U.S. at 213-214).

Similarly, in determining whether the City petitioners had acted or failed to act with segregative purpose or intent, the lower Courts held that:

> . . . a finding of *de jure* segregation could be based on acts of omission or commission under taken by govern-

mental authorities which have the natural and foreseeable consequence of causing educational segregation (App. 175a).

Once such a finding was made, the Courts below concluded that a presumption of segregative purpose was created (App. 177a). The burden was then upon the defendant school officials to show that the pattern of actions could be explained in a manner consistent with the absence of segregative intent (App. 177a).* Failing to come forward with such an explanation, the lower Courts concluded that "it is entirely reasonable to infer that the officials acted with unlawful segregative intent." (App. 177a).

Rather than dispense with the requirements that segregative intent or purpose be proven, the Courts below held that the required segregative intent could be inferred from acts or policies of school authorities which had the natural and foreseeable effect of creating segregated schools. This test is entirely consistent with decisions of this Court. An "invidiously discriminatory purpose may be inferred from the totality of relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

2. The findings of the District Court and the Court of Appeals that the City petitioners were guilty of *de jure* conduct clearly did not rest solely upon the resultant disproportionate

* This principle has been upheld by this and other Courts. *Keyes, supra*, 413 U.S. at 209-210, and cases cited therein, *Arlington Heights, supra*, 429 U.S. at 270, fn. 21. *Oliver v. Kalamazoo Board of Education*, 508 F.2d 178 (6th Cir., 1974), *cert. denied*, 421 U.S. 963 (1975); *NAACP v. Lancing Board of Education*, 559 F.2d 1042 (6th Cir., 1977), *cert. denied*, 98 S.Ct. 635 (1977).



impact of the petitioners actions and policies.* While not conclusive proof of invidious racial discrimination, disproportionate impact is relevant and provided an important starting point for the lower Courts in their analyses. *Washington v. Davis, supra*, 426 U.S., at 242.

In addition to the substantial racial imbalance in the Buffalo Public Schools, the lower Courts also found that the City petitioners had engaged in conduct which has been found by this and other Courts to evidence *de jure* segregation. Specifically, the District Court found, and the Court of Appeals affirmed, that the City petitioners had manipulated school attendance zones in a segregative manner (App. 332a-342a, 180a), had permitted racially segregative student transfers (App. 362a-432a, 180a-181a), had drawn school attendance boundaries for the newly constructed Woodlawn Junior High School in a racially segregative manner (App. 442a-542a, 181a), had created optional zones and permitted transfers which allowed white students to avoid attending schools with predominantly black student enrollments (App. 54a-64a, 181a); had promulgated racially discriminating admission policies with respect to the City's vocational schools (App. 64a-69a, 181a); had practiced racial discrimination and segregation in the recruitment and assignment of staff mem-

* In characterizing the issue for resolution, as identified by the District Court in its reconsideration opinion, as "whether it had found a constitutional violation on the basis of disproportionate impact alone, without a finding of racial discriminatory intent." (Petitioners' Brief, at 28), the City Petitioners misstate the District Court. The question on reconsideration as defined by the District Court was:

> . . . did this Court find that the defendants intentionally acted and refused to act so as to segregate and maintain the segregated condition of the Buffalo Public School Systems, or did it find a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent (App. 155a).

In affirming liability against the City petitioners, the District Court concluded that its findings were based upon the former.

bers (App. 68a-77a, 181a) and had engaged in "delatory, evasive and at times obstructionist" actions in response to the State Commissioner and Regents' order to integrate (App. 77a-98a, 182a).

The Courts below also found that other City of Buffalo officials including its Common Council, operated in lock-step with the school authorities to exacerbate and perpetuate segregation within the public schools, by systematically denying funding to programs which would have encouraged racial integration (App. 86a-90a, 182a), by racially segregating residents within public housing projects operated by the City (App. 102a-108a), and by segregatively relocating displaced families whose homes were razed pursuant to the City's urban renewal programs (App. 109a-110a).

In rebuttal to such overwhelming *prima facie* evidence of *de jure* segregation, the City petitioners alleged only that they had followed a "racially neutral neighborhood school policy." The Courts below held that the City petitioners had not met their burden of showing that the instances of segregation were not caused by their design or device. *Keyes, supra*, 412 U.S. at 210. In finding that the neighborhood school policy was not racially neutral, the District Court observed that this policy was:

> . . . followed when its results were seen as acceptable; it was disregarded and subverted when the Board saw fit (App. 100a).

As this Court has noted:

> . . . the mere assertion of such a policy is not dispositive where . . . the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation. *Keyes, supra*, 413 U.S. at 212.



3. The City petitioners' contention that *Arlington Heights, supra*, requires a finding of subjective racial motivation or illicit purpose is not supported by this Court's decision in that case. Racial animosity, ill will or intent to do harm are not necessary criteria to support a finding of segregative intent or purpose.

It is the intent to segregate regardless of personal motivation which is relevant and probative.

In *Washington v. Davis, supra*, Justice Stevens, in a concurring opinion, wrote:

> Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making and of mixed motivation. It is unrealistic on the one hand, to require the victim of alleged discrimination to uncover actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate actions simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it (426 U.S. at 253).

Similarly, this Court in *Arlington Heights, supra*, held that it was not necessary that a plaintiff prove that a challenged action rested solely on racially discriminatory purposes. 429 U.S., at 265, citing *Washington v. Davis*. This is so because:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. 429 U.S. at 265.

In *Arlington Heights*, this Court identified, "without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." The City petitioners' conclusion, however, that *Arlington Heights* requires "personal admissions of the target public officials as a basis for the required inference of an illicit motive." (Petitioners' Brief, at 28) is simply a misstatement and misinterpretation of this Court's instructions in *Arlington Heights*.

4. The City petitioners' assertion that the District Court improperly relied on evidence of segregatory housing policies of various public and private entities is without merit.

From the start of this action, the City petitioners consistently raised, as a defense to school segregation, residential segregation which existed within the City of Buffalo. When, however, proof was offered which unequivocally demonstrated that action under color of state law helped to produce, in the first place, the residential segregation, the City petitioners abandoned their position and claimed that such evidence was irrelevant.

Pages 101a to 114a of the App. contain the Trial Court's discussion and findings upon the housing evidence in its liability decision of April 30, 1976. Pertinent parts are set out in the following:

> IV-H. *HOUSING*
>
> THE EVIDENCE
>
> None of the parties to this lawsuit dispute the existence of severe residential segregation in the City of Buffalo, nor do the parties dispute the fact that the housing problems have contributed to the racial isolation and imbalance present in the Buffalo public schools. The City defendants claim that the housing segregation is the direct cause for the school segregation, that they are blameless for the existence of residential segregation and are not constitutionally required to correct it (Answer



> for City Defendants at ¶¶ 17, 19; Post-trial Brief for City Defendants, at 1). Consequently, they argue that any evidence regarding the housing situation is irrelevant to the issue: intentional segregation in the BPSS (Record, Vol. IV, at 143, 161-162, 173; Vol. V, at 110-111; Vol. VI at 10). The State defendants agree that the housing evidence should have been stricken at trial as irrelevant. In addition, they argue that they have no legal responsibility for housing matters in New York State (Post-trial Brief for State Defendants, at ¶¶ 36, 37).
>
> The plaintiffs introduced evidence tending to show that both the containment of minorities in certain areas of the City, and the exclusion of minorities from suburban areas, did not occur by chance. This evidence can most easily be discussed by dealing with the allegedly discriminatory parties seriatim: (1) The Federal Government; (2) The Buffalo Municipal Housing Authority [BMHA], (3) The Real Estate Industry, and (4) The City of Buffalo (App. 101a).

The Court considered the relevancy of the housing evidence at pages 110a *et seq.*, of the App. noting that such evidence has not been ruled inadmissable by the Supreme Court (cf. *Milliken v. Bradley*, 418 U.S. 717 at 728 n. 7 (1974)) and stated "Because of the defendants' primary reliance on the residential composition of Buffalo as a defense to this action, we feel it necessary and appropriate to express our findings on the housing evidence." (App. 11a) and at pages 112a and 113a:

> The City defendants cannot use the residential segregation as a defense because, as the evidence demonstrates, they helped to cause the residential segregation through the Ellicott Relocation Program. The Common Council's portable classroom ordinance, discussed in section IV-F of this opinion, *supra*, and the Board's districting of Woodlawn Junior High School, discussed in section IV-B of this opinion, *supra*, are examples of how the City defendants attempted to sustain and prolong the racial separation in schools that residential

> segregation encourages. But, even had the City defendants not actually contributed to residential segregation, to allow them to hind behind a condition they have long been aware of, that they have the authority to alleviate and that they once, in the City's Model Cities application, committed themselves to rectify, would be untenable.

The District Court made specific findings that many of the practices of the City of Buffalo authorities, who are petitioners herein, contributed to or intensified racial residential segregation in the City. These actions coupled with the school authorities operation of a "neighborhood school policy" in a manner which maximized racial segregation within the schools clearly was probative and relevant evidence of segregative intent.

This Court has long recognized the reciprocal effect the racial composition of schools and residential neighborhoods have on one another. *Keyes, supra,* 413 U.S. at 202. In *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) this Court stated:

> . . . People gravitate toward school facilities, just as schools are located in response to the needs of people. The locations of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. 402 U.S. at 20.

**II. The Courts Below Did Not Apply Inconsistent Standards as Between City-State Defendants.**

Starting at page 35 of Petitioners' brief, it is "argued" that "The Circuit Court Applied Inconsistent Standards of Intent to the City and State Defendants."

The basis of this contention is unclear as the "reasoning" in pages 35-39 discusses subjective-objective aspects in contradictory fashion.



The Second Circuit's reversal as to the State defendants was based upon the conclusion that "We are unable to conclude that the state appellants acted or omitted to act with the required segregative intent" (App. 185a), in spite of the Court's not disagreeing with the trial Court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter (App. 184a). The Second Circuit also noted "Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith." (App. 185a).

The findings below as to all city Petitioners are succinctly summarized by the Trial Court:

> "The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.
>
> "The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration." (App. 77a, 77b).

There was powerful evidence of segregative intent as to all City Petitioners. The issuing of causal relationship was one of fact for the lower Courts. The statement at page 36 of Petitioners' brief that "While it may reasonably be maintained that there was substantial evidence of overt bigotry in oc-

casional actions by the Common Council, as was revealed in the portable classroom controversy, no causative relationship was shown between that unworthy conduct and the segregated character of the school system", is tantamount to an admission of segregative intent by the Petitioner Common Council. It also highlights the Second Circuit conclusion:

> We are unable to imagine a set of facts, short of public admission of wrongdoing, which would be more suggestive of intentional discriminations (App. 182a).

## CONCLUSION

**The petition for certiorari should be denied.**

Dated: Buffalo, New York
August 1, 1978

Respectfully submitted,

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